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384-638—70

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1442

DEAN FOODS COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2–4) is reported at 421 F. 2d 664. The Board's decision and order (Pet. App. A5–18) are reported at 171 NLRB No. 60.

JURISDICTION

The order of the court of appeals (Pet. App. A1) was entered on January 20, 1970, and a petition for rehearing was denied on March 4, 1970. The petition for a writ of certiorari was filed on April 20, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, where the employer's objections to a representation election presented no material factual issues, the Board properly overruled the objections without holding an evidentiary hearing.

2. Whether the Board reasonably concluded that the employer's objections to the representation election did not warrant setting aside the election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 3–5 of the petition.

STATEMENT

On July 20, 1967, pursuant to a Stipulation for Certification Upon Consent Election (Pet. App. A8),[1] the Board's Regional Director conducted an election among the Company's production and maintenance employees, which the Union won.[2] On July 25, the Company filed objections to the election (*ibid.*; R. 9–10).[3] Pursuant to the Board's Rules and Regulations[4]

[1] Section 102.62(b) of the Board's Rules and Regulations (29 CFR 102.62(b)) provides that the employer and the union, with the approval of the Regional Director, may "enter into an agreement providing for a waiver of hearing and a consent election leading to a determination by the Board of the facts ascertained after such consent election, if such a determination is necessary."

[2] Oil, Chemical and Atomic Workers International Union, AFL–CIO.

[3] "R." references are to the appendix in the court below.

[4] Section 102.69 (c) and (e) (29 C.F.R. 102.69 (c), (e)), of the rules provides:

"(c) If objections are filed to the conduct of the election or conduct affecting the result of the election * * * the regional

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the Regional Director conducted an administrative investigation of the issues raised by the objections, in which the parties were given an opportunity to submit relevant evidence. On September 1, the Regional Director issued his report, concluding that the objections were without merit and recommending that they be overruled (Pet. App. A8, A22–33). The Company's relevant objections,[5] the facts developed in the investigation, and the Director's findings and conclusions are as follows:

1. The Company alleged that:

> The Union distributed literature on the day of the election that was stolen from the Company's files at a time so close to the holding of

director shall investigate such objections * * *. If a consent election has been held pursuant to section 102.62(b) [as was the case here], the regional director shall prepare and cause to be served * * * a report on * * * objections * * * including his recommendations * * *. Within 10 days from the date of issuance of the report on * * * objections * * * any party may file with the Board in Washington, D.C., eight copies of exceptions to such report, with supporting brief if desired * * *."

"(e) In a case involving a consent election held pursuant to section 102.69(b), if exceptions are filed, * * * to the report on * * * objections, * * * and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. * * * If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer. * * *"

[5] The Company filed five objections; however, since the Company did not contest before the Board the Regional Director's adverse rulings with respect to objections 2, 3, and 5 (R. 9–10), further review of those rulings is foreclosed.

> the election that the Company did not have an adequate opportunity to reply, and * * * such stolen Company memoranda had such an affect [*sic*] as to totally mislead and antagonize the eligible employees against the company * * *. [Pet. App. A23; R 9.]

The memorandum in question, which was directed to "All Supervisory Personnel," announced an improved vacation program "for all non-union salaried employees" and stated: "Do not post this notice, and please inform the employees under your supervision personally since this change in our vacation plan could have an adverse effect on labor negotiations" (Pet. App. A34). According to Company Plant Superintendent Wesley Hollis, the memorandum was received from the Company's Chicago office in May 1967, and sealed copies were distributed to all supervisory personnel. Hollis further stated that, on or about June 1, 1967, he noticed that a copy distributed to the laboratory supervisor was missing from his file basket, where it had been placed pending his return from a leave of absence; that at 9 a.m., on July 19, 1967, he observed that a copy of the memorandum was placed in each employee's slot on the time clock, and a copy was on each of the Company's four bulletin boards; and that at 9:30 p.m., on July 19, a rank-and-file employee informed him that copies of the memorandum had been distributed at a union meeting the previous evening, and that because of the memorandum he had changed his mind and would vote for the Union (Pet. App. A25–26). Finally, Hollis stated that, since July 19 was the day off for all but nine of the

Company's work force, the Company did not think it would do much good to reply to the memorandum (Pet. App. A25).

Union Representative Owen stated that, on July 14 or 15, 1967, he received the vacation memorandum anonymously through the mail in a plain white envelope. He further stated, as did various employees who attended, that, at a union meeting on July 18, he read the memorandum aloud to the approximately 15 employees who were present; that one employee mentioned seeing it before; that, when asked to read it again, he made about 7 photostatic copies, distributing them to the 15 employees present; and that these copies were brown-tinted and did not contain the addition, "This is what the Company thinks of us," as did the black-tinted copies found in the plant. Finally, Owen stated that he gave no instructions to distribute these leaflets at the plant and did not know who distributed them. (Pet. App. A27.)

On the basis of the foregoing facts, the Regional Director found that by 9 a.m. of the day before the election the Company was aware of the distribution of the memorandum; that by 9:30 p.m. on the same day it was aware of the alleged impact of the memorandum upon at least one employee; and that despite this knowledge the Company neglected to take action to counteract any misunderstanding caused by the memorandum. The Regional Director concluded that, since the election was not scheduled until 2 p.m. on July 20, 1967, and the size of the unit was small (50 employees), the Company had an adequate opportunity to take such corrective action. He further con-

cluded that the evidence adduced by the investigation did not support a finding that the Union was in any way responsible for the misappropriation of the Company memorandum. (Pet. App. A27–28.)

2. The Company also objected on the ground that prior to the election the Union "made vigorous attempts * * * to coerce certain eligible employees to file and participate in bringing unmeritorious and false charges against the employer and his agents," thereby adversely affecting the employees' freedom of choice (Pet. App. A24). In support of this objection, Superintendent Hollis stated that an employee reported that Union Representative Owen had asked whether he had been offered a raise to stay on his job and, if so, whether he would sign an affidavit to that effect. According to Hollis, the employee also reported that Owen had said that, if charges were filed, the Union could become the bargaining representative without an election. The Regional Director concluded that, assuming *arguendo* that the incident occurred, it could not reasonably be found that it interfered with the voters' freedom of choice, and thus it afforded no basis for setting the election aside. (Pet. App. A31.)

Accordingly, the Regional Director recommended to the Board that the Union be certified (Pet. App. A33). The Company filed exceptions to the Regional Director's report (Pet. App. A8; R. 23–32). As to the first objection, the Company again contended that it did not have adequate time to explain the memorandum. The Company added that it was not concerned with the identity of whoever misappropriated the memorandum (R. 26–27). Similarly, as to the other

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objection, the Company did not dispute the Regional Director's summary of Superintendent Hollis' version of the incident, but merely contested the Director's finding that, "assuming arguendo that the incident occurred as alleged by the Employer, it cannot be reasonably found that it interfered with the voters' freedom of choice" (R. 27).[4] The Company requested the Board either to set the election aside, or to conduct a hearing "to resolve remaining issues of credibility and fact that the Regional Director has omitted from his conclusion" (R. 31).

The Board ruled that the Company's objections and exceptions to the Regional Director's report "raise no material or substantial issues of fact or law which would warrant reversal of the Regional Director's findings and recommendations or require a hearing" (Pet. App. A21, n. 1). Accordingly, the Board adopted those findings and recommendations, and certified the Union as the exclusive bargaining representative of the Company's employees (Pet. App. A2). The Board thereafter denied the Company's request for reconsideration (Pet. App. A8).

The Company refused to bargain with the Union; and an unfair labor practice complaint was issued by the Board's General Counsel, who, after the Company had filed an answer, moved for summary judgment on the pleadings (Pet. App. A9). The Trial Examiner granted the General Counsel's motion, finding that the Company had raised no issue which had not been

[4] The Company's additional exceptions (R. 30–31) are not relevant to the petition in this Court.

previously considered and rejected by the Board in the representation proceeding (Pet. App. A11–12).

The Board adopted the Trial Examiner's finding that the Company violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the Union (Pet. App. A5). The Board ordered the Company to cease and desist from the unfair labor practices found, and to bargain with the Union upon request (Pet. App. A15–18).

The court of appeals, in a *per curiam* opinion, sustained the Board's findings and conclusions, and enforced its order (Pet. App. A2–4).

ARGUMENT

1. The first question raised in the petition (Pet. 2)—whether the Board is required to give plenary review to a Regional Director's report on objections to an election before entering an unfair labor practice order—is not presented in this case because the Board did grant plenary review. The applicable Board rule (n. 4, *supra*) provides that, whenever either party to an election of the type involved here files exceptions to the Regional Director's report on objections, the Board will review the Director's challenged findings on the merits; and the Board did so here. *Pepsi-Cola Bottling Co.* v. *National Labor Relations Board*, 409 F. 2d 676 (C.A. 2), certiorari denied, 396 U.S. 904, is thus inapposite; there the function of determining representation issues had been delegated to the Regional Director, and the Board merely retained a discretionary right to review his decision. See *National*

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Labor Relations Board v. *The Process Corp.*, 412 F. 2d 215, 217–218 (C.A. 7).

2. The second question posed by petitioner (Pet. 3)—whether it was entitled to a hearing "to resolve evidentiary conflict"—similarly is not presented on this record. The Board's rules provide for a hearing on exceptions to a report on objections where "substantial and material factual issues" are raised (n. 4, *supra*), but there were no such issues here. As shown, in overruling the objections which are properly in issue, the Regional Director assumed the truth of petitioner's factual allegations, but found them to be legally insufficient to warrant setting aside the election (*supra*, pp. 5–6).[1]

3. Accordingly, the only question properly presented is whether the Board reasonably concluded that petitioner's objections did not justify setting aside the election. That question is primarily a matter for the sound discretion of the Board (*National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226), and does not warrant further review. In any event, the Board acted reasonably here (*see supra*, pp. 2–7).

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[1] The remaining allegations of factual conflict raised by petitioner relate to objections as to which it had not filed exceptions (n. 5, *supra*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.

MAY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

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